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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 92

THE UNITED STATES, APPELLANT

v.

WABASH RAILWAY COMPANY

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 10) is found in 59 Ct. Cls. 322.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered in the Court of Claims March 3, 1924. A motion for a new trial was entertained and denied May 5, 1924. Appeal was taken June 2, 1924, under Sections 242 and 243, Judicial Code. (R. 11.)

STATEMENT

The single question is whether the suit of the Wabash Railway Company is controlled by the general statute of limitations allowing six

years for suits in District Courts and in the Court of Claims,[1] or by the three-year limitation applicable to suits by carriers to recover their charges found in Section 16, paragraph 3, of the Interstate Commerce Act, as amended by the Transportation Act of 1920, and as further amended by the Act of June 7, 1924.

The Wabash Railway Company furnished passenger service to the United States in August, 1917. The bill for this service, less a deduction made by the United States, was paid in March, 1918. (R. 9.) This suit was brought on March 17, 1923, to recover the balance unpaid of the bill for services rendered in August, 1917, on the theory that the deduction was unauthorized.

Section 16, paragraph (3), of the Interstate

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[1] SEC. 24, par. 20. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court. * * * *And provided further*, That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: * * *.

SEC. 156. Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: * * *.

Commerce Act, as amended by the Transportation Act of 1920, approved February 28, 1920, is as follows (Chap. 91, 41 Stat. 456, 492):

> (3) All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration, begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the district court or State court within one year from the date of the order, and not after.

By an Act approved June 7, 1924, paragraph (3) of Section 16 of the Interstate Commerce Act was further amended to read as follows (Chap. 325, 43 Stat. 633):

(3) (a) All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

(b) All complaints against carriers subject to this Act, for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

(c) For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this Act within three years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the three-year period of limitation in subdivision (c) a carrier subject to this Act begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the

time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

(f) A petition for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

(g) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

(h) The provisions of this paragraph (3) shall extend to and embrace cases in which the cause of action has heretofore accrued as well as cases in which the cause of action may hereafter accrue, except that actions at law begun or complaints filed with the commission against carriers subject to this Act for the recovery of overcharges where the cause of action accrued on or after March 1, 1920, shall not be deemed to be barred under subdivision (c) if such actions shall have been begun or complaints filed prior to enactment of this paragraph or within six months thereafter.

It will be noted that whether this cause of action accrued in August, 1917, when the service was rendered, or in March, 1918, when part of the bill

was paid, it accrued prior to the passage of the Transportation Act of 1920.

THE QUESTIONS

The questions presented are whether the three-year limitation in the Transportation Act on suits by carriers to recover their charges is applicable to suits by carriers to recover charges from the United States; and if so, whether the three-year statute of limitations found in the Transportation Act of 1920 was retrospective in its application so as to apply to a cause of action accruing prior to its passage.

If the Act of 1920 is held prospective, the question then involved is whether it would apply only to causes of action accruing after its passage or whether it applied to causes of action accruing prior to its passage but allowed three years from the date of its enactment.

Finally, if this cause of action was not barred by the Act of 1920, whether the amendment of June 7, 1924, to paragraph 3 of Section 16 of the Interstate Commerce Act operated to bar the cause of action, even though suit had been commenced upon it.

ASSIGNMENTS OF ERROR

I. The Court of Claims erred in holding that the cause of action was not barred by the statute of limitations found in paragraph 3 of Section 16 of the Interstate Commerce Act, as amended by

the Transportation Act of 1920 and as amended by the Act of June 7, 1924.

II. The Court of Claims erred in granting judgment against the United States.

ARGUMENT

SUMMARY

I. The three-year statute of limitations upon suits by carriers to recover their charges found in the Transportation Act of 1920 is applicable to suits by carriers against the United States.

II. The cause of action in this case accrued either in August, 1917, when the service was rendered, or in March, 1918, when part of the charges were paid.

III. The amendment found in the Transportation Act to paragraph 3 of section 16 of the Interstate Commerce Act, applying a three-year limitation to suits by carriers to recover their charges, was retrospective and applied to a cause of action which accrued prior to its passage, where a reasonable time remained, as in this case, within which to bring suit.

IV. Even if the three-year limitation as enacted in the Transportation Act of 1920 was inapplicable to this cause of action, the amendment of June 7, 1924, operated to bar the claim, even though suit had been instituted and was pending.

V. If the three-year statute of limitations in the Transportation Act of 1920 is to be treated as prospective, it need not be limited in its ap-

plication to causes of action accruing after its passage, but may be held to allow three years after its passage within which to commence suits on causes of action theretofore accruing.

VI. Conclusion.

I

THE THREE YEAR STATUTE OF LIMITATION IN THE TRANSPORTATION ACT OF 1920 APPLIES TO ACTIONS AGAINST THE UNITED STATES IN ANY COURT AS WELL AS TO ACTIONS AGAINST PRIVATE SHIPPERS

In broad and sweeping unequivocal language, and without reservation, exception, or provision, the Congress enacted that "*all* actions at law by carriers for recovery of their charges, or any part thereof, *shall* be begun within three years from the time the cause of action accrues, *and not after.*

Practically the entire revenue of any carrier consists of its charges for transportation. Only small amounts are derived from amusement parks, store rentals, news stands, etc. Readily observable is it that the prompt collection of all charges for transportation is of the utmost importance to the public. Therefore it is a part of the National policy that all charges of carriers for transportation shall be promptly collected. The three-year statute of limitations is made applicable to *all* charges, to *all* shippers, and to *all* courts, National and State, and was designed to accomplish a definite and specific purpose.

Paragraph (3) of Section 16 was enacted as an amendment to the Interstate Commerce Act by the Transportation Act of 1920, which "introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy,* 257 U. S. 563, 585. * * * The new purpose was expressed in unequivocal language and to attain it, new rights, new obligations, new machinery were created. The new provisions took a wide range." *New England Divisions Case,* 261 U. S. 184, 189.

The fundamental purpose of the statute of limitations as contained in the acts to regulate commerce is to bring about uniformity, as "to have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished." *Phillips* v. *Grand Trunk Railway,* 236 U. S. 662, 667.

Such a policy enables the Government to inform itself of the financial status of these carriers, for after the lapse of three years there are no such charges to be claimed. Moreover, under such a policy preferences and discriminations which in-

evitably flow from noncollection of freight charges are diminished.

In *DuPont* v. *Davis, Director General,* 264 U. S. 456, 462, this Court, speaking by Mr. Justice Sutherland, said: "Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government," citing *United States* v. *Whited & Wheless,* 246 U. S. 552, 561.

With equal force it may be said that statutes of limitation applied by the Government in bar of recovery against it should receive such a construction as may best protect the public interest, certainly when that construction is reasonable and brings harm to no one.

The policy of the legislation, the circumstances and conditions, the purposes which the statute was designed to subserve, the reasonableness of the fixed time, injury or lack of injury to others, and in this instance the right of the Government to assert the same right as any other shipper, are all matters, among other things, to be considered.

The all-embracing language of the statute is utterly void of any semblance of an exception or reservation and was so intended. Opposing counsel would read the language as follows: "All actions at law by carriers subject to this Act for recovery of their charges or any part thereof, *except actions against the United States,* shall be

begun within three years from the time the cause of action accrues and not after."

The authority for such a construction is negatived by all legislation on the subject. Sec. 22 (Ch. 382, § 9, 25 Stat. 855, 862) provides that nothing shall prevent the carriage of property, at free or reduced rates, "for the United States, State, or municipal Governments." There the exception was expressly made. In *United States* v. *State of Tennessee,* 262 U. S. 318, this Court held that in the absence of arrangement for such free or reduced rates, Section 22 might not be set up as a permission for the State to discriminate in favor of intrastate traffic against interstate traffic.

Similarly, under Section 405, par. (2) (Ch. 91, 41 Stat. 479), Congress enacted that "no carrier * * * shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination, *provided* that the provisions * * * shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or any agency thereof." There again the exception was expressly made.

If Congress had intended to except the Government from the operation of this all-important statute affecting the commerce of the country, in which the Government is one of the largest of shippers, it is inconceivable that it would not have done so in express words.

In *St. Louis, Brownsville & Mexico Railway* v. *United States,* 268 U. S. 169, this Court, speaking through Mr. Justice Brandeis, said (pp. 173–174):

> In respect to furnishing transportation, a railroad ordinarily bears to the Government the same relation that it does to a private person using its facilities. It may exact payment either in advance or upon the completion of the service rendered. It may, as a matter of accommodation or convenience, give a reasonable credit. Payment for transportation, as for other service or supplies, may ordinarily be secured by presenting the claim to the appropriate disbursing officer of the department served.

The fact that the Government consented to be sued only in the Court of Claims, and in the District Courts when the requisite jurisdictional amount appears, does not alter the situation. The three-year limitation is binding on *all* courts. It is idle to argue that if Wabash Company brought a suit in the Municipal Court of Chicago to recover such charges from a shipper the three-year limitation would apply, and if it brought a similar suit for similar charges against the United States in the Court of Claims or the District Court the

limitation would not apply. All courts are charged with the enforcement of the Interstate Commerce Act which fixes the limitation; otherwise we would have as many statutes of limitations as we have States of the Union with the six-year limitation under the Court of Claims act thrown in. The fundamental purpose of the statute was to bring about uniformity.

In *Fort Pitt Gas Co.* v. *United States,* 49 Ct. Cls., 224, 234, the Court of Claims, speaking through Chief Justice Campbell, said:

> The general statute of limitations of actions in this court, sec. 156, Judicial Code, prescribes that a claim is barred unless the petition be filed "within six years after the claim first accrues." This statute, fixing a rule applicable to cases generally, is not necessarily inconsistent with the sections of the Revised Statutes above mentioned, which fix the limitation for a particular class of cases "in any court." Statutes in *pari materia* are to be construed together, and repeals by implication are not favored if the acts can reasonably stand together. *The Distilled Spirits,* 11 Wall. 365; *State* v. *Stoll,* 17 Wall. 425, 436; *Rogers' Case,* 36 C Cls. 266; 185 U. S. 83; *Petri* v. *Creelman Lumber Co.,* 199 U. S. 487, 497. "The general statute is read as silently excluding from its operation the cases which have been provided for by the special one." Endlich Inter. Stat., sec. 223. We deem

> it unnecessary to decide the question as to whether a suit can be brought in this court under the statute applicable to this court or should be brought in the class of cases under consideration against the collector, because, under the view we take, the claimant's cause of action is barred, even if the court have jurisdiction of such a suit brought in time. We hold that the limitation fixed by section 3227, Revised Statutes, is applicable and not the six-year limitation of section 156, Judicial Code. *Christie-Street Com. Co.* v. *United States,* 129 Fed. 506; 136 Fed. 326; *Schwarzchild-Sulzberger & Co.* v. *Rucker, collector,* 143 Fed. 656.

In *Kahn, Executor,* v. *United States,* 55 C. Cls., 271, 286 (affirmed, 257 U. S. 244), the Court of Claims said:

> This action was commenced July 2, 1917. The general statute of limitations in this court (section 156, Judicial Code) is not permissive in form in the sense that it specifically permits *any action* of which this court has jurisdiction to be brought at any time within six years, notwithstanding any other statute, but it forever bars any claim unless sued upon or transmitted within six years, and hence there is no necessary conflict between it and the provisions of section 3227, applicable to a particular class of cases, prohibiting the maintenance of any suit of this character *in any court* unless brought within two years. *Fort Pitt Gas Co.* v. *United States,* 49 C. Cls., 224 at

234, citing *Christie-Street Com. Co.* v. *United States*, in the Circuit Court of Appeals for the Eighth Circuit, 136 Fed. 326, in which it was said: "It is an action directly against the United States, and the logical and unavoidable conclusion is that it was barred by the limitation of section 3227, because it was not commenced until more than two years after the cause of action it presents accrued."

II

THE CAUSE OF ACTION ACCRUED EITHER IN AUGUST, 1917, OR MARCH, 1918

The service was rendered in August, 1917. Part of the charges was paid in March, 1918. Whether the cause of action accrued when the service was rendered, in August, 1917, or when the bill was paid, March, 1918, is unimportant. In the one case, if the three-year statute of limitation was applicable and ran from the date of the accrual of the cause of action, the cause of action would have been barred in August, 1920, allowing nearly six months after the passage of the Transportation Act of 1920 within which to bring suit; while in the other case, assuming the cause of action accrued in March, 1918, it would have been barred by the three-year statute of limitation in March, 1921, more than a year after the passage of the Transportation Act of 1920. In either of the cases the action would be barred before the suit was commenced on March 17, 1923.

III

THE THREE YEAR STATUTE OF LIMITATIONS ENACTED IN THE TRANSPORTATION ACT OF 1920 WAS RETROSPECTIVE IN ITS APPLICATION

The well-known rule of construction that all statutes are to be considered prospective unless language is express to the contrary (*Danzer* v. *Gulf & Ship Island Railroad,* 000 U. S. 000, decided June 8, 1925; *Fullerton Co.* v. *Northern Pacific,* 266 U. S. 435, 437) is inapplicable to the present controversy. Courts have never hesitated to give a retrospective effect to statutes of limitation when the time remaining to the plaintiff within which to bring the suit was reasonable.

"If no right is impaired or destroyed by giving a statute of limitation a retroactive effect, the reason of the rule upon which the plaintiff relies ceases, and the rule itself should also cease" (*Button* v. *Atchison, Topeka & Santa Fe,* 1 Fed. Rep. (2d) 709, 711).

That six months or one year was a reasonable time within which to bring the suit after the statute became effective is abundantly sustained by the great weight of authority.

United States v. *Morena,* 245 U. S. 392, 397.

Canadian Northern Railway v. *Eggen,* 252 U. S. 553, 562.

Saranac Land Co. v. *Comptroller of New York,* 177 U. S. 318, 323, 324.

Turner v. *New York,* 168 U. S. 90, 94.

Koshkonong v. *Burton,* 104 U. S. 668, 674, 675.

Schauble v. *Schulz,* 137 Fed. Rep. 389, 393.

McGahey v. *Virginia,* 135 U. S. 662, 705, 707.

In *Button* v. *Atchison, Topeka & Santa Fe,* 1 Fed. Rep. (2d) 709, 711, 712, paragraph (3) of Section 16 received the very careful and full consideration of the Circuit Court of Appeals for the Eighth Circuit, Circuit Judge Kenyon and District Judges Amidon and Scott concurring. Every possible phase and effect of the statute was considered. In giving the statute a retrospective application, and denying the right of the carrier to maintain the suit to recover charges claimed to be due from the shipper, the Court said:

> (3) At the time the federal statute took effect there remained eight months within which the plaintiff could have brought its action under that law. That was a reasonable time. The question therefore presented is: Did Congress intend to preserve the plaintiff's right by this legislation or to enlarge it? Was it the intent of the act to extend the period of limitation for the carrier for two years and four months? No such intent is expressed in the law, and there is no reason in justice for thus enlarging the plaintiff's right by construction.
>
> It is not a question of power, but of intent. It is settled beyond controversy that the legislature may apply a new statute of

limitations to existing rights and shorten the time for their enforcement.

* * * * *

(4) There is another ground upon which the case may be rested. Plaintiff's right of action is given by statute. It was not created for its entertainment but to protect the public against secret rebates and discriminations. It is not a right of contract or of property. The right, therefore, is at all times under the full control of the legislature. It may limit it in any way without impairing any constitutional right of the plaintiff.

* * * * *

The Supreme Court has frequently commented upon the hardship inflicted upon shippers by suits of this character. *Pittsburgh, etc., Ry. Co.* v. *Fitch*, 230 U. S. 317, 322; *Louisville, etc., Ry. Co.* v. *Maxwell*, 237 U. S. 94, 97. They are allowed not for the benefit of the carriers, but for the protection of the public. The short limit fixed by the act of 1920 has for its object the collusion of shippers.

* * * * *

The shipment was delivered by the plaintiff October 24, 1917. By the express language of the federal statute above quoted, that was the time when plaintiff's cause of action accrued. The claim was presented January 24, 1918. The present action was commenced September 10, 1920. By the express above quoted, plaintiff's right

of recovery was barred, and the decision of the trial court should be reversed.

In *Leach v. Powder River Live Stock Co.*, 132 Fed. Rep. 434, a statute of limitations of Nebraska reduced, in some instances to three months, the period within which an action may be commenced upon a judgment rendered without the State upon a cause of action accruing more than six years before the commencement of the action upon the judgment. Holding that the shortened limitation was intended to apply to actions upon existing judgments, and that the *three months* limitation was unreasonable and void, Circuit Judge Van Devanter (Circuit Judges Sanborn and Hook concurring) said:

> [illegible] time within which [illegible] limitation of [illegible] is considered, the question arises whether it is reasonable. No reported decision has come under our observation which sustains a like limitation. The following cases sustain limitations of unquestionably the periods named: *Terry v. Anderson*, 95 U. S. 628, nine and one-half months; *Evans v. Evans*, 102 U. S. 345, eight and one-half months; *Wheeler v. Jackson*, 137 U. S. 245, six months; *Pierce v. Two Feet*, 142 U. S. 90, six months; *Sloan v. Biemiller*, 31 Minn. 520, about nine and one-half months; *Bissell v. Hadley County*, 45 Minn. 174, six months; *Hamilton v. Brown*, 2 Dillon, 406, two months; *Smith v. Pinkard*, 15 Wis. 471, eight and

one-half months; *Cameron* v. *Louisville, etc., Ry. Co.,* 69 Miss. 78, one year; *Horbach* v. *Miller,* 4 Neb. 31, four and one-half months; *Myers* v. *Wheelock,* 60 Kan. 747, six months; *Power* v. *Kitching,* 10 N. D. 254, 86 N. W. 737, seven months. In *McGahey* v. *Virginia,* 135 U. S. 662, 708, a limitation of one year was declared unreasonable, and in *Berry* v. *Ransdall,* 4 Mete. (Ky.) 292, the same was said of a limitation of thirty days. In *Bank* v. *Braithwaite,* 7 N. D. 358, 372, it was doubted whether three and one-half months was a reasonable time, but thirteen months was pronounced reasonable. No useful purpose would be served by referring more particularly to the limitations which were sustained or rejected in these cases. It is sufficient to say that all of the cases recognize the true rule to be that a limitation is unreasonable which does not, before the bar takes effect, afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate, and that this opportunity must be afforded in respect to existing rights of action after they come within the present or prospective operation of the statute and in respect of prospective rights after they accrue.

IV

EVEN IF THE THREE-YEAR STATUTE OF LIMITATIONS AS ENACTED IN THE TRANSPORTATION ACT OF 1920 WAS INAPPLICABLE TO THIS CAUSE OF ACTION, THE AMENDMENT OF JUNE 7, 1924, OPERATED TO BAR THE CLAIM, EVEN THOUGH SUIT HAD BEEN INSTITUTED AND WAS PENDING

Assuming that the three-year statute of limitations enacted in 1920 is to be treated as prospective in the sense of applying only to causes of action accruing after its passage, it is then necessary to consider the effect of the amendment of June 7, 1924.

At the time of the passage of the Act of June 7, 1924, litigation over this statute had already occurred, and the differences of opinion respecting the application of the statute were no doubt called to the attention of Congress (*Louisville Cement Co.* v. *Commission*, 246 U. S. 638). The Act of June 7, 1924, reiterates the provision that actions at law by carriers for recovery of their charges shall be begun within three years from the time the cause of action accrues. Then follows subdivision (h), which is as follows (Ch. 325, 43 Stat. 633):

> The provisions of this paragraph (3) shall extend to and embrace cases in which the cause of action has heretofore accrued as well as cases in which the cause of action may hereafter accrue, except that actions at law begun or complaints filed with the commission against carriers subject to this Act for the recovery of over-

> charges where the cause of action accrued on or after March 1, 1920, shall not be deemed to be barred under subdivision (c) if such actions shall have been begun or complaints filed prior to enactment of this paragraph or within six months thereafter.

By the express language of subdivision (h) the effect of the statute was to then bar causes of action not in suit which had accrued three years or more prior to the passage of the Act of June 7, 1924. It is evident that subdivision (h) made no change with respect to the statute of limitations applicable to causes of action accruing after the passage of the Transportation Act of 1920, because that statute admittedly applied a three-years statute of limitations to causes of action accruing after its passage. The retrospective operation of subdivision (h) was therefore limited to causes of action which had accrued prior to the passage of the Transportation Act of 1920. The sole and only purpose of subdivision (h), therefore, must have been to make it clear that the three-years statute of limitations applied to causes of action accruing prior to the Transportation Act of 1920 and to destroy them and prevent their prosecution, unless suit had theretofore been brought within three years from the time the cause of action had accrued. No other interpretation of the express language of subdivision (h) seems possible without distorting its terms or resorting to judicial legislation. There is nothing about the statute which shows

that there could have been any intent to discriminate in favor of claims where suit had already been commenced, although not brought within three years from the accrual of the cause of action, as against cases where more than three years had elapsed since the cause of action had accrued and on which suit had not yet been commenced.

If subdivision (h) of the Act of 1924 had stopped short after providing that the paragraph applied to cases where causes of action had theretofore accrued, it still might have been possible to construe the section as not applying to cases which had been commenced and were pending, although brought more than three years after the cause of action had accrued, but the exception contained in the last part of subdivision (h) seems to render this construction impossible. The exception provides that certain actions shall not be deemed barred—

> if such actions shall have been begun or complaints filed prior to enactment of this paragraph or within six months thereafter.

This exception seems to make it plain that subdivision (c), relating to suits or complaints for overcharges, would have operated to bar pending actions which had not been brought within three years of the time the cause of action accrued, if such action was not saved by the exception. It is true that this exception in subdivision (h) refers only to subdivision (c), which deals with

claims by shippers against carriers for overcharges; but if subdivision (c) construed in connection with subdivision (e) and the first part of subdivision (h) would have operated to bar causes of action, even though suits were then pending, it is impossible to see why subdivision (a), relating to suits by carriers, construed in connection with subdivision (e) and the first part of subdivision (h) would not have done likewise. The conclusion seems inevitable that Congress understood that, without a saving exception such as is contained in subdivision (h), the fact that a suit had already been commenced and was pending would not save the cause of action against the limitation prescribed.

The plain purpose of the Act was to make the limitation of three years apply to causes of action accrued prior to the passage of the 1920 Act; and to apply the new limitation to cases where suit had already been commenced when the 1924 Act was passed involves a result no more drastic than to apply it to cases where suit had not been commenced but a cause of action still existed, through the fact that the six-year statute of limitation had not run. It may be argued that this construction would result in the Act being declared unconstitutional and void as respects certain classes of cases within its terms. That may be admitted if the Act of 1924 is to be treated as effecting a change in the law and not as a declaration of the intent of the 1920 Act. The limitation is not

restricted in its application to suits against the Government. It applies to suits by carriers against private shippers. The same language can not mean one thing for the Government and another thing for private shippers. It has been held that the due process clause of the Fourteenth Amendment prevents a State from passing a statute of limitations abrogating existing causes of action without giving a reasonable opportunity to sue after the passage of the Act. The due process clause of the Fifth Amendment, operating on Congress, would seem to prevent Congress from passing a valid statute abrogating an existing cause of action in favor of a carrier against a private shipper without giving the carrier a reasonable opportunity to sue after the passage of the Act.

It may be argued that because the Act of 1924 would be inoperative and invalid as applied to cases where the defendant is a private shipper but in other respects like the present cases, Congress could not have intended to discriminate in favor of the Government; and if the Act is obnoxious to constitutional provisions as applied to cases like the present, involving private shippers, it should be considered inoperative as to any such case against the Government. On the other hand, it may be said that the United States may withhold its consent to be sued, and having once given its consent it may withdraw it; that as applied to these particular cases Congress had the right to

withdraw its consent to a suit against the United States, even though suit had been instituted; that as applied to these particular cases the Act is constitutional; and that the Court, in view of the express language and necessary implications to be drawn from the language of the statute, should enforce it in every case where it is not met with constitutional objections.

We have discussed the Act of June 7, 1924, on the theory that it changed the law. In this view it would undoubtedly be unconstitutional as applied to some cases involving private shippers. Such a result should be avoided if possible. *It may be avoided* by construing the 1920 Act as applying to causes of action accruing prior to its passage, making the time run either from the accrual or from the passage of the Act of 1920, and thus accepting the Act of 1924, not as affecting a change in the law but as declaratory of the purpose of the earlier Act. The amendment of June 7, 1924, fastens paragraph (3) upon the cause of action of appellant beyond any doubt, whether the cause of action arose in August, 1917, when the freight was delivered, or in March, 1918, when the deduction was made (*Louisville Cement Co.* v. *Commission*, 246 U. S. 638).

In *Jordan v. Roche*, 228 U. S. 436, 446, it was held that the Act of February 4, 1909 (Ch. 65, 35 Stat. 594), was unnecessary for the purpose of subjecting bay rum imported from Porto Rico to the tax imposed upon distilled spirits, inasmuch as the bay

rum was taxable under the Foraker Act of April 12, 1900 (Ch. 191, 31 Stat. 77). Speaking of the later Act, Mr. Justice McKenna said: "The law was not the declaration of a new policy but a more explicit expression of the purpose of the prior law, made necessary by the judicial construction of that law."

V

IF THE THREE YEAR LIMITATION ENACTED IN THE TRANSPORTATION ACT OF 1920 IS TO BE TREATED AS PROSPECTIVE, IT NEED NOT BE LIMITED IN ITS APPLICATION TO CAUSES OF ACTION ACCRUING AFTER ITS PASSAGE, BUT MAY BE HELD TO ALLOW THREE YEARS AFTER ITS PASSAGE WITHIN WHICH TO COMMENCE SUITS ON CAUSES OF ACTION THERETOFORE ACCRUING

Assuming that the Act of 1920 is to be given a prospective operation, the question arises as to what form this operation will take. In dealing with this subject in *Sohn* v. *Waterson,* 17 Wall. 596, 599, Mr. Justice Bradley said:

> To avoid such a result and to give the statute a construction that will enable it to stand, courts have given it a prospective operation. In doing this, three different modes have been adopted by different courts. One is to make the statute apply only to causes of action arising after its passage. But as this construction leaves all actions existing at the passage of the act without any limitation at all (which, it is presumed, could not have been intended), another rule adopted is to construe the statute as applying to such existing actions only as have already run out a portion of the statutory

time, but which still have a reasonable time left for prosecution before the statutory time expires—which reasonable time is to be estimated by the court—leaving all other actions accruing prior to the statute unaffected by it. The latter rule does not seem to be founded on any better principle than the former. It still leaves a large class of actions entirely unprovided with any limitation whatever, or, as to them, is unconstitutional, and is a more arbitrary rule than the first. A third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others. It was substantially adopted by this court in the cases of *Ross* v. *Duval* (13 Pet. 62) and *Lewis* v. *Lewis* (7 How. 778). In those cases certain statutes of limitation—one in Virginia and the other in Illinois—had originally excepted from their operation nonresidents of the State, but this exception had been afterwards repealed, and this court held that the nonresident parties had the full statutory time to bring their actions after the repealing acts were passed, although such actions may have accrued at an earlier period. "The question is," says C. J. Taney (speaking in the latter of the cases just cited), "from what time is this limitation to be calculated? Upon principle it would seem to be clear that it must commence when the cause of action is first subjected to the operation of the statute, unless the legis-

lature has otherwise provided." It is true that in the subsequent case of *Murray* v. *Gibson* (15 Id. 421), this court followed the decisions of the Supreme Court of Mississippi in its construction of a statute of that State and held that it applied only to actions accruing after the statute was passed. But that decision was made in express deference to those of the State court, which were regarded as authoritative. In the present case we are not bound by any decisive construction of the State court on this point.

In dealing with this statute in *Schaff, Receiver of the Missouri, Kansas & Texas Ry. Co. of Texas,* v. *The United States,* 59 Ct. Cls. 318, the court adopted that solution which results in allowing three years after the passage of the Act to bring suit on causes of action accruing prior to its passage. It may be that some of the considerations which induced the Court in *Sohn* v. *Waterson* to adopt this solution of a prospective operation for the statute do not exist in this case, because making the statute apply only to causes of action accruing after its passage does not leave a cause of action accruing prior to its passage without any limitation at all, as the general six-year statute would apply to all causes not covered by the three-year statute. That Congress intended, however, that the three-year statute adopted in the Transportation Act of 1920 should

be applicable to causes of action already accrued, to the extent at least of limiting the time for commencing suit to a period of three years after the passage of the statute, is indicated by the purpose of the statute, which was to produce uniformity and reduce the time within which such suits might be commenced.

The amendment of June 7, 1924, hereinbefore more fully discussed, should be treated not as effecting a change in the law but as a declaration of the purpose of Congress to make the Act of 1920 apply to causes of action accruing prior to the passage of the 1920 Act to the extent at least of placing on them a limitation of three years from the passage of the Act of 1920. *Any other interpretation of the Act of 1920 results in giving an effect to the Act of 1924 which in some cases involving private shippers would render the Act of 1924 unconstitutional.*

VI

CONCLUSION

It must be concluded, therefore, that the three-year statute of limitations contained in the Transportation Act applies as well in favor of the Government as in favor of private shippers; that the limitation first applied in the Transportation Act of 1920 may properly be applied to causes of action accruing prior to its passage, where, as in this case, a reasonable time remained after the passage of the Act within which to commence

suit; that if the Act of 1920 must be treated as prospective in its application, a construction making it applicable to causes of action accruing prior to its passage, but allowing three years after its passage within which to bring suit, is sustained by the authorities and consistent with the purpose of the Act; and, finally, in the event that legislation prior to June 7, 1924, did not bar this claim, the amendment of that date, expressly retrospective in its operation and evidently intended to apply to claims involving pending actions as well as to those in which no suit has been commenced, operates to bar the claim.

The judgment of the Court of Claims should be reversed and the cause remanded with directions to dismiss the petition.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

OCTOBER, 1925.

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